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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ELVIS RUIZ, FRANCISCO JAVIER CASTRO and EDUARDO MARTINEZ, Plaintiffs, vs. MAX FERNANDEZ and ANN FERNANDEZ, a marital community; and WESTERN RANGE ASSOCIATION, a foreign nonprofit organization,, Defendants.	No. CV-11-3088-RMP PLAINTIFFS' RESPONSE TO DEFENDANTS MAX AND ANN FERNANDEZ' AND WESTERN RANGE ASSOCIATION'S MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiffs hereby respond to the motions to dismiss for lack of subject matter jurisdiction filed by defendants pursuant to F.R.C.P. 12 (b)(1). (Ct. Rec. 27 and 31). Defendants' motions to dismiss should be denied as without a legal basis, since this Court has undisputed subject matter jurisdiction in this case. Plaintiffs

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have asserted federal claims against defendants under the Fair Labor Standards Act ("FLSA") and Trafficking Victims Protection Reauthorization Act (TVPRA)[1], thereby providing the court with jurisdiction pursuant to 28 U.S.C. § 1331. (Ct. Rec. 1 ¶ 4). The Court has authority to exercise supplemental jurisdiction to hear plaintiffs' related state law claims pursuant to 28 U.S.C. § 1367(a). Defendants do not contest either of these bases for jurisdiction. The arguments that defendants do raise in their motion have no basis in established law. Therefore, defendants' motions should be denied.

I. STATEMENT OF THE CASE

This is an action filed by three Chilean sheepherders who were recruited by defendant Western Range Association to work in the United States on a temporary basis pursuant to the H-2A visa program. Plaintiff sheepherders were sent to work at defendant Fernandez' ranch in Centerville, Washington. Under the H-2A program, an agricultural employer may contract with temporary foreign guest workers if it obtains certification from the U.S. Department of Labor ("DOL") that qualified U.S. workers are not available and that employment of the foreign guest workers will not adversely affect wages or working conditions of similarly situated U.S. workers. Based on defendants' applications for H-2A certification and representations that plaintiffs would be employed as range sheepherders, the DOL

[1] Plaintiffs assert the FLSA claim against defendant WRA only and the TVPRA claim against Defendant Fernandez only.

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permitted defendants to contract with plaintiffs under terms that included a wage rate specific to sheepherders, $750 per month regardless of the number of hours worked. (Ct. Rec. 1 at ¶¶ 11, 15, 27-30.)

However defendants did not assign plaintiffs to work primarily as range sheepherders. Instead, plaintiffs were put to work as ranch hands on defendant Fernandez' ranch, for which they were legally entitled to substantially higher wages than they were paid. Furthermore, defendant Fernandez treated plaintiffs abusively, threatened them with deportation if they left the boundaries of the ranch without his permission and otherwise restricted plaintiffs' contact with the outside world in violation of the TVPRA. (Ct. Rec. 1 at ¶¶ 42-44, 79-84.)

When considering a 12(b)(1) motion to dismiss, a court must accept "all allegations of material fact as true and construe them in the light most favorable" to the non-moving party. *North County Community Alliance v. Salazar,* 573 F.3d 738, 741 - 742 (9th Cir. 2009). Plaintiffs have asserted violations of the Fair Labor Standards Act, breach of contract, quantum meruit and violations of state wage laws against defendant WRA, and violations of the federal TVPRA, breach of contract, quantum meruit and violations of state wage law against defendants Fernandez. (*See* Ct. Rec. 1 ¶ 60-84).

II. ARGUMENT

A. This Court has subject matter jurisdiction over plaintiffs' federal and state-law claims.

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This court has subject matter jurisdiction in this case pursuant to 28 U.S.C. §1331 over Plaintiffs' federal TVPRA and FLSA claims and pursuant to 28 U.S.C. §1367 over Plaintiffs' state contract and wage claims. Plaintiffs' complaint alleges a federal claim under the TVPRA against defendants Fernandez and a FLSA claim against defendant WRA. Plaintiffs' complaint also asserts related state-law causes of action under Washington wage law and contract law. Since the state claims arise out of the same facts as do the federal claims, the state claims are subject to supplemental jurisdiction under §1367.

Defendants do not dispute the Court's jurisdiction in this case pursuant to 28 U.S.C. §1331 and §1367. Instead, defendants have raised arguments that have no basis in the law and misrepresent plaintiffs' asserted basis for jurisdiction. Given the Court's undisputed jurisdiction pursuant to §1331 and §1367, the arguments advanced in defendants' memorandum fail to establish any valid challenge to jurisdiction. Defendants' main point of attack of the Court's jurisdiction in this case -- that plaintiffs have no basis to remedy defendants' breach of their H-2A contract obligations in *any court* – is unsupported by any authority.

B. Defendants' arguments that state-law contract claims are not available to H-2A workers are baseless.

i. H-2A workers may bring state contract claims for breach of the H-2A clearance orders.

The Ninth Circuit has held specifically that H-2A contract claims, while not

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creating independent federal jurisdiction, do give rise to contract claims under state contract law. *Nieto-Santos v. Fletcher Farms,* 743 F.2d 638 at 641, n.5 (9th Cir. 1984). Defendants' contentions that breach-of-contract claims for H-2A contracts are precluded by DOL agency remedies or by 8 U.S.C. §1329 (Ct. Rec. 28 at 3 - 11) are thus contrary to direct circuit precedent.

Defendants' arguments are also entirely unsupported even by persuasive authority, since every court to consider contract claims by H-2A workers has, like *Nieto Santos,* held that H-2A clearance orders are employment contracts that can be enforced in court. *See, e.g., Arriaga v. Fla. Pac. Farms,* 305 F.3d 1228, 1233 n. 5 (clearance orders are contracts) and 1246 – 1248 (applying state contract law to the clearance orders' terms) (11th Cir. 2002); *Salazar–Calderon v. Presidio Valley Farmers Ass'n,* 765 F.2d 1334, 1342 (5th Cir.1985), *cert. denied,* 475 U.S. 1035 (1986) (holding that the DOL regulations are incorporated into the contracts); *Frederick County Fruit Growers v. McLaughlin,* 703 F.Supp. 1021, 1030 - 1031 (D.C.D.C. 1989); *Hernandez v. Two Brothers Farm,* 579 F.Supp.2d 1379, 1383 (S.D. Fla 2008); *Perez-Benites v. Candy Brand,* 2011 WL 1978414 at *6 (W.D. Ark. 2011). Defendants have cited no case that has held to the contrary.

ii. Federal regulation of H-2A contracts does not preclude workers' enforcement of contract rights; instead, the H-2A contracts incorporate federal, state, and local regulations.

When concluding that H-2A contracts are enforceable under state contract

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law, courts have necessarily rejected defendants' argument (expressed in Ct. Rec. 28 at 3) that the existence of a federal agency enforcement mechanism precludes state-law contract claims. *See Arriaga,* 305 F.3d at 1235 - 1237; *Frederick County,* 703 F.Supp. at 1030 - 1031; *Centeno-Bernuy v. Becker Farms*, 564 F.Supp.2d 166, 183 - 185 (W.D.N.Y. 2008). Indeed, plaintiffs are not even required to exhaust administrative remedies before filing a contract action. *See Centeno-Bernuy,* 564 F.Supp.2d at 184.

Defendants suggest that the federal regulatory scheme's relationship to Plaintiffs' contract claims requires the Court to conclude that H-2A workers have no contractual remedies under H-2A contracts, either because they are preempted by the regulatory scheme (Ct. Rec. 28 at 3 – 7) or because H-2A contract claims are "disguised" attempts to bring a private action to enforce a federal statutory scheme (Ct. Rec. 28 at 14), which is, in defendants' view, not allowed under *Cort v. Ash*, 422 U.S. 66 (1975). No court has adopted either of those arguments (See cases cited *supra.*)

Courts uniformly deal with the interrelation between the federal statute and the contract cause of action by finding that the "terms of a job clearance order which reflect DOL requirements become a part of the employment contract as a matter of law." (emphasis added) *Frederick County,* 703 F.Supp. at 1031, citing *Salazar–Calderon,* 765 F.2d at 1342 (5th Cir.1985). Courts, including the Ninth

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Circuit, find that H-2A contracts are enforceable under state contract law, and that the existence of federal statutory enforcement mechanisms does not preempt the state contract law remedy. *See Nieto-Santos,* 743 F.2d 638 at 641; *Arriaga,* 305 F.3d 1235 – 1237. (*See also Avery v. City of Talladega,* 24 F.3d 1337, 1348 (11th Cir.1994) (FLSA does not preempt state contract claims)).

This rule aligns with the Supreme Court's holding that a contract that incorporates federal statutory language does not necessarily create a federal cause of action; but it does leave such a contract enforceable under state contract law. *Jackson Transit Authority v. Local Division 1285,* 457 U.S. 15, 23 - 28 (1982).[2]. In *Nieto-Santos,* the Ninth Circuit applied *Jackson Transit* to state law claims arising out breach of H-2A contracts. *Id.,* at 641.

iii. Defendants offer no authority to contradict the settled rule that workers may enforce H-2A contracts which incorporate terms required under federal regulations

Defendants confusingly refer to 8 U.S.C. §1329 (Ct. Rec. 28 at 7) to argue that only the DOL, and not workers, can enforce H-2A contracts. But § 1329 does not preclude a private individual from litigating in federal court, so long as another basis for federal subject-matter jurisdiction is present (e.g. §1331 and §1367). Nor does defendants' reference to *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999) support any argument relevant to this case. *Reno*

[2] *Jackson* also said that the state-law contract claims could be brought into federal court under pendent jurisdiction, 457 U.S. at 28 n.11, which is the jurisdictional posture of this case.

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considered a jurisdictional provision of the INA – 8 U.S.C. §1252(g) – and interpreted that provision to mean that immigrants could not sue the Attorney General for three narrow actions: commencing, adjudicating, and executing removals. *Reno* at 482. The instant case does not have to do with immigration proceedings and is not an action against the Attorney General. *Reno* and §1329 thus lack any relevance to this case.[3]

iv. Defendants' *Cort v. Ash* argument is inapposite, since plaintiffs have not alleged a private right of action under the H-2A statute

Defendants' assertion that under *Cort v. Ash* plaintiffs lack a private right of action to enforce the H-2A statute is inapplicable to this case. (Ct. Rec. 28, 8 – 13). Plaintiffs assert breach of contract claims under state law, not a private right of action to enforce the H-2A statute.

III. CONCLUSION

This court has subject-matter jurisdiction over all of plaintiffs' claims both pursuant to §1331 because of their federal claims under TVPRA and FLSA, and pursuant to § 1367 supplemental jurisdiction over the state claims because these claims are part of the same case or controversy and stem from a common nucleus of facts. Defendants' assertions that Congress meant to preclude state-law contract claims for H-2A contract violations has no basis in any authority and contradicts

[3] *Reno* itself emphasized that its holding was limited to three types of INA claims, and rejected the notion that in enacting IIRIRA Congress had "impose[d] a general jurisdictional limitation" on the federal courts. *Reno* at 482.

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precedent binding on this court. For those reasons, defendants' Rule 12(b)(1) motions to dismiss plaintiffs' state-law claims for lack of subject-matter jurisdiction should be DENIED.

DATED this 8th day of November, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2011, I electronically filed the foregoing with the Clerk of the Court using CM/EFC System which will send notification of such filing to the following:

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